THE UNITED STATES COURT OF FEDERAL CLAIMS (BID PROTEST)

CSI AVIATION, INC.))
Plaintiff,)
v.) Case No. 18-253C) Judge Griggsby
THE UNITED STATES OF AMERICA,) Judge Griggsby
Defendant,)) Public Version
and) Tublic version
CLASSIC AIR CHARTER, INC.)
Defendant-Intervenor.))

PLAINTIFF CSI AVIATION INC.'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

Pursuant to Rules 52.1, 57 and 65 of the Rules of the United States Court of Federal Claims and the Court's May 2, 2018 Scheduling Order, ECF No. 29, Plaintiff CSI Aviation, Inc. ("CSI"), by and through its counsel, respectfully moves the Court for judgment on the administrative record, and requests that the Court grant judgment in its favor.

As more fully described in the accompanying Memorandum in Support of its Motion for Judgment on the Administrative Record, CSI seeks a declaratory judgment and a permanent injunction to set aside the arbitrary, capricious, and unlawful decision by the United States, acting by and through United States Department of Homeland Security, Immigration and Customs Enforcement ("ICE" or "Agency") to award Classic Air Charter Inc. ("CAC") an order, against the General Service Administration schedule under Request for Quote No. HSCECR-17-Q-00005 ("RFQ"), to provide daily charter flight services.

Specifically, CSI requests that this Court enter (i) an order declaring that the Agency was

arbitrary and capricious and acted in violation of the applicable law and regulations when it

awarded the ICE task order to CAC, and (ii) an injunction setting aside the Agency's task order

award to CAC and requiring the Agency to re-procure the daily charter flight services consistent

with the law and the terms of the RFQ.

WHEREFORE, Plaintiff CSI respectfully requests that this Court issue an order granting

the relief requested.

Respectfully submitted,

Vedder Price, P.C.

s/ Eric J. Marcotte

Eric J. Marcotte

David M. Hernandez

Kelly E. Buroker

Tamara Droubi

Counsel for CSI Aviation, Inc.

DATED: May 15, 2018

2

THE UNITED STATES COURT OF FEDERAL CLAIMS (BID PROTEST)

)
)
) Case No. 18-253C) Judge Griggsby
)) FILED UNDER SEAL
)
)
)
))

MEMORANDUM IN SUPPORT OF PLAINTIFF CSI AVIATION, INC.'S MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

VEDDER PRICE P.C.

Eric J. Marcotte, Esq. Vedder Price P.C. 1401 I Street, NW, Suite 1100 Washington, DC 20005 202-312-3336 (direct dial) 202-312-3322 (facsimile) emarcotte@vedderprice.com

Counsel of Record for Plaintiff CSI Aviation, Inc.

DATED: May 15, 2018

Of Counsel:

David M. Hernandez Vedder Price P.C. 1401 I Street, NW, Suite 1100 Washington, DC 20005 (202) 312-3340 (phone) (202) 312-3322 (fax) dhernandez@vedderprice.com

Tamara Droubi Vedder Price P.C. 1401 I Street, NW, Suite 1100 Washington, DC 20005 (202) 312-3368 (phone) (202) 312-3322 (fax) tdroubi@vedderprice.com Kelly E. Buroker Vedder Price P.C. 1401 I Street, NW, Suite 1100 Washington, DC 20005 (202) 312-3339 (phone) (202) 312-3322 (fax) kburoker@vedderprice.com

TABLE OF CONTENTS

		Page
INTR	ODUCTION AND STATEMENT OF THE CASE	1
QUE	STION PRESENTED	2
RELE	EVANT FACTUAL AND PROCEDURAL BACKGROUND	2
I.	THE REQUEST FOR QUOTATIONS	2
II.	ORIGINAL PROPOSALS AND DISCUSSIONS	4
III.	ICE'S ORIGINAL AWARD DECISION	5
IV.	PROTESTS BEFORE GAO AND THE SBA	6
V.	THE REMAND AND NEW AWARD DECISION	7
JURI	SDICTION AND STANDARD OF REVIEW	8
ARG	UMENT	10
I.	ICE UNREASONABLY EVALUATED CAC'S TECHNICAL APPROACH WITH RESPECT TO ITS ABILITY TO PROVIDE THE PROMISED AIRCRAFT	10
II.	ICE'S EVALUATION OF CAC'S EXPERIENCE WAS FLAWED	21
III.	ICE'S EVALUATION OF CAC'S PAST PERFORMANCE WAS FLAWED	26
IV.	ICE CONDUCTED A FLAWED AND UNFAIR EVALUATION OF CSI'S PAST PERFORMANCE	30
V.	ICE IMPROPERLY EVALUATED CAC'S TECHNICAL APPROACH/QASP	35
VI.	ICE'S ERRORS INVALIDATED ITS BEST VALUE DECISION, AND PREJUDICED CSI	37
VII.	CSI IS ENTITLED TO PERMANENT INJUNCTIVE RELIEF	39
CON	CLUSION	40
CEDI	FIEICATE OF SEDVICE	

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
Advanced Data Concepts, Inc. v. United States, 216 F.3d 1054 (Fed. Cir. 2000)	18
American Auto Logistics, LP v. United States, 117 Fed. Cl. 137 (2014)	30, 34
American Auto Logistics, LP v. United States, 599 F. App'x 958 (Fed. Cir. 2015)	30
Bannum, Inc. v. United States, 404 F.3d 1346 (Fed. Cir. 2005)	38
Califano v. Sanders, 430 U.S. 99 (1977)	9
Citizens to Preserve Overton Park Inc. v. Volpe, 401 U.S. 402 (1971)	9
CMI Mgmt., Inc. v. United States, 115 Fed. Cl. 276 (2014)	26
Concourse Grp., LLC v. United States, 131 Fed. Cl. 481 (2017)	35
FFL Pro, LLC v. United States, 124 Fed. Cl. 536 (2015)	18
Great Lakes Dredge & Dock Co. v. United States, 60 Fed. Cl. 350 (2004)	10
Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324 (Fed. Cir. 2001)	9, 10, 18
Lab. Corp. of Am. Holdings v. United States, 116 Fed. Cl. 643 (2014)	26
MORI Assocs., Inc. v. United States, 102 Fed. Cl. 503 (2011)	39
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983)	

TABLE OF AUTHORITIES (continued)

	Page
NetStar-1 Gov't Consulting, Inc. v. United States, 101 Fed. Cl. 511 (2011)	39
NetStar-1 Gov't Consulting, Inc. v. United States, 473 Fed. Appx. 902 (Fed. Cir. 2012)	39
Parcel 49C, Ltd. P'ship v. United States, 31 F.3d 1147 (Fed. Cir. 1994)	39-40
PGBA, LLC v. United States, 389 F.3d 1219 (Fed. Cir. 2004)	39
Precision Asset Mgmt. Corp. v. United States, 135 Fed. Cl. 342 (2017)	29
Pricewaterhouse-Coopers Public Sector LLP v. United States, 126 Fed. Cl. 328 (2016)	8-9
Springfield Parcel C, LLC v. United States, 124 Fed. Cl. 163 (2015)	36
Vanguard Recovery Assistance v. United States, 101 Fed. Cl. 765 (2011)	34
Wetsel-Oviatt Lumber Co. v. United States, 43 Fed. Cl. 748 (1999)	39
COMPTROLLER GENERAL	
Applied Technical Sys., Inc., B-404267, Jan. 25, 2011 2011 CPD ¶ 36	34
Belzon, Inc., B-404416, Feb. 9, 2011 2011 CPD ¶ 40	25
Dix Corp., B-293964, July 13, 2004 2004 CPD ¶ 143	22

TABLE OF AUTHORITIES (continued)

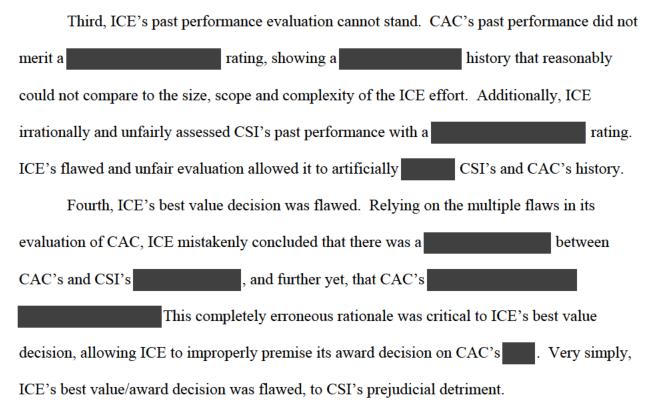
	Page
Mesa, Inc., B-254730, Jan. 10, 1994 94-1 CPD ¶ 62	22
NAHB Research Ctr., Inc., B-278876, May 4, 1998 98-1 CPD ¶ 150	29
<i>Tech. Res., Inc.</i> , B-253506, Sept. 16, 1993 93-2 CPD ¶ 176	22
FEDERAL STATUTES	
5 U.S.C. § 706(2)(A)	9
10 U.S.C. § 2304c(e)	8
28 U.S.C. § 1491(b)(1)	8
28 U.S.C. § 1491(b)(2)	8, 9
28 U.S.C. § 1491(b)(4)	9
REGULATIONS	
48 C.F.R. Part	2. 9
14 C.F.R. Part 117	35

INTRODUCTION AND STATEMENT OF THE CASE

Plaintiff CSI Aviation, Inc. ("CSI") respectfully submits this Memorandum in Support of its Motion for Judgment on the Administrative Record ("Motion"). CSI challenges the decision of the United States, acting by and through the United States Department of Homeland Security, Immigration and Customs Enforcement ("ICE" or "Agency") to award Classic Air Charter Inc. ("CAC") an order, against the General Service Administration ("GSA") schedule under Request for Quote No. HSCECR-17-Q-00005 ("RFQ"), to provide Daily Charter Flight Services. In awarding the order to CAC, ICE violated the RFQ and applicable regulations and proceeded without rational basis, entitling CSI to judgment as a matter of law.

First, the most significant obligation under the RFQ is providing the specific aircraft proposed to perform daily rendition flights. During the reevaluation process, ICE reminded the offerors that See T. 161 at 4478 (emphasis added). ICE specifically directed offerors to Id.(emphasis added). . Notwithstanding, ICE irrationally rated CAC under the (most important) Technical Approach subfactor—even though it knew there was a serious risk that CAC might not deliver the proposed planes. Second, the record confirms that ICE's evaluation of CAC's experience was likewise flawed. Despite the RFQ's preclusion, ICE improperly to CAC. Further, ICE irrationally to CAC, deeming facially valid the amorphous roles of these during

performance.



For these reasons, as well as the additional reasons stated herein, the Court should grant CSI's Motion for Judgment on the Administrative Record.¹

QUESTION PRESENTED

Whether ICE's award of the ICE task order to CAC was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

I. THE REQUEST FOR QUOTATIONS

On July 14, 2017, ICE issued the RFQ under Federal Acquisition Regulation ("FAR")

Part 8 seeking proposals from vendors holding contracts under General Services Administration

("GSA") Schedule 599 for daily charter flight services for the ICE Air Operations Division, in

¹ Administrative Record citations use the following: "T. __ at [bates page number]."

support of ICE Enforcement and Removal Operations. T. 6 at 320. The required daily charter flight services included two general charter aircraft services—daily scheduled large aircraft ("DSLA") charter flights staged out of five U.S. hubs, and special high risk charter ("SHRC") flights—for the transportation of illegal aliens. The RFQ made clear that the single most significant element of this procurement was the DSLA component, *see id.* at 368, requiring offerors to propose a fleet of 10 DSLA aircraft "exclusively available for flights every Monday through Friday, 52 weeks per year." *Id.* at 334. As such, ICE required offerors to identify each promised DSLA aircraft with specificity, including the precise Federal Aviation Administration ("FAA") tail numbers and registered owners for each proposed aircraft. *Id.* at 361-62. The competition was restricted to small businesses.²

The RFQ contemplated award of a single task order, with a one-year base period and four one-year option periods, for a total potential five-year performance period. *Id.* at 320, 359. Per the RFQ, the successful contractor would be selected based on a best value tradeoff basis, considering the following factors: (1) Technical Capability, (2) Past Performance, and (3) Price. *Id.* at 364. Technical Capability was significantly more important than Past Performance, and the two non-price factors (Technical Capability and Past Performance) were, when combined, significantly more important than Price. *Id.* The RFQ also established three Technical Capability subfactors: (1) Technical Approach/Quality Assurance Surveillance Plan ("QASP"), (2) Charter Aviation Experience, and (3) Key Personnel. *Id.* The RFQ listed these subfactors in "descending order of relative importance" and, in the evaluation, ICE would separately score

_

² ICE issued the RFQ as a total small business set aside under North American Industry Classification System Code 481211 (Nonscheduled Chartered Passenger Air Transportation), which has a 1,500 employee size standard.

³ The single task order is intended to replace five separate task orders—one for each DSLA hub airport—that are currently held by CSI.

each subfactor to arrive at an overall Technical Capability rating. Id.

The RFQ explained that ICE would evaluate the Technical Capability factor (and three subfactors) using the following scale: Outstanding, Good, Acceptable, Marginal, and Unacceptable. *Id.* at 366. Under the RFQ's definitions, a proposal containing <u>any</u> weaknesses could not achieve an Outstanding rating. *Id.* The RFQ established that ICE would use the following scale to evaluate the Past Performance factor: High Confidence (Outstanding), Substantial Confidence (Good), Satisfactory Confidence (Satisfactory), Limited Confidence (Marginal), No Confidence (Unsatisfactory), and Unknown Confidence (Neutral). *Id.* at 367.

II. ORIGINAL PROPOSALS AND DISCUSSIONS

CSI timely submitted its proposal on July 14, 2017. Notably, CSI offered 25 specific				
DSLA aircraft, T. 7 at 536-37, that were singularly available to CSI as a result of its exclusive				
teaming agreements with three qualified air carriers:				
. CSI assured ICE of its capacity to provide the proposed aircraft by including				
commitment letters from each air carrier, stating:				
	ī			
<i>Id.</i> at 554-56.				

During discussions, CSI reiterated that all of its proposed aircraft were supported by exclusive contracts with the respective carriers. T. 23 at 1089-90. CSI also described the careful process it had undertaken in order to select these aircraft and carriers:

Id.

III. ICE'S ORIGINAL AWARD DECISION

award decision on the following evaluation ratings:

On October 20, 2017, ICE informed CSI of its decision to award the task order to CAC for \$646,004,106.40 (including all options), T. 53 at 1657, which

T. 1 at 1. ICE based the

	CSI	CAC			
Technical Approach/QASP					
Charter Aviation Experience					
Key Personnel					
Overall Technical Capability					
Past Performance					
Price		\$646.0 M			

T. 50 at 1579-80, 1596-97. In making the award decision, ICE's source selection authority

⁴ See also T. 9 at 716 (proposing); T. 10 at 794 (proposing).

("SSA") recognized CSI was , but concluded that CSI's offered by CAC.

Id. at 1597. The SSA thus decided that CAC represented the best value to ICE. Id. at 1598.

IV. PROTESTS BEFORE GAO AND THE SBA

CSI timely filed a challenge to CAC's size status with the Small Business Administration ("SBA") on October 27, 2017. CSI premised its size protest on indicia of CAC's affiliation with large businesses under the identity of interest and ostensible subcontractor rules. *See* T. 245. Concurrently, CSI timely protested the award to CAC at the Government Accountability Office ("GAO") on October 30, 2017. *See* T. 58.

Before GAO, CSI argued it was unreasonable for ICE to rely on CAC's representation that it had "entered into initial agreements" with aircraft proposed, as no documentation supported the existence of such agreements. Further, the propriety of any preliminary arrangement that CAC may have imagined existed was entirely undercut by the exclusive teaming agreements that CSI had provided with its proposal.

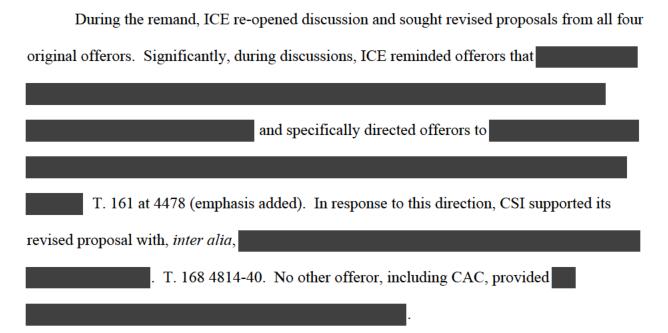
Moreover, CSI pointed out that shortly after award, CAC had subsequently admitted to the SBA that it had not executed any agreements with and that it had no intention of subcontracting with account of See T. 147 at 4206, 4208-09. CSI argued the lack of any credible evidence that CAC could (or would) provide the proposed aircraft should have undermined CAC's score under the Technical Approach criteria. In addition, CSI asserted that ICE had conducted improper discussions and misevaluated CAC's experience and past performance.

GAO denied CSI's protest on February 7, 2018. T. 155. Seemingly placing significant weight on the fact the RFP did not expressly require that offerors provide teaming agreements, GAO denied CSI's arguments regarding CAC's capacity to provide the offered aircraft. *Id.* at

4420-23. Although GAO identified numerous other flaws in the evaluation process, including ICE's conduct of unequal discussions and improper evaluation of CAC's experience and past performance, it concluded that these errors were not prejudicial. *See id.* at 4421, 4430.

V. THE REMAND AND NEW AWARD DECISION

On February 16, 2018, CSI filed its original Complaint with this Court in the captioned action. ECF No. 1. On February 21, 2018, the Court granted Defendant's motion for voluntary remand to allow ICE to "reconsider its award decision . . . in light of: (1) plaintiff's allegations in the complaint; (2) a recent decision by the [GAO] in this matter; and (3) any new information gathered during the proposed remand period." *See* ECF No. 13.



Following the completion of discussions, ICE re-evaluated the four proposals, which included the identification of perceived strengths and weakness and the award of ratings for the Technical Capability and Past Performance factors. ICE also determined proposed pricing was "fair and reasonable"

T. 196 at 6206. ICE's remand evaluation conclusions can be summarized as follows:

	CSI	CAC	
Technical Approach/QASP			
Charter Aviation Experience			
Key Personnel			
Overall Technical Capability			
Past Performance			
Price		\$635.42 M	

Id. at 6207. Per the RFQ, ICE conducted a trade-off analysis to determine best value. Based on the following rationale, ICE again selected CAC instead of CSI for award:



Id. at 6225.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction to hear bid protests pursuant to 28 U.S.C. § 1491(b)(1) of the Tucker Act. While the Federal Acquisition Streamlining Act ("FASA") precludes the Court from hearing protests "in connection with the issuance or proposed issuance of a task or delivery order," 10 U.S.C. § 2304c(e), FASA's prohibition does not apply to orders issued against GSA Federal Supply Schedules ("FSS"). *Pricewaterhouse-Coopers Public Sector LLP v. U.S.*, 126

Fed Cl. 328, 342-46 (2016) (jurisdiction to adjudicate protests challenging task or delivery orders issued against GSA FSSs has been upheld by the Federal Circuit). As the Court has consistently held, "FASA's limitation . . . does not extend to task orders issued pursuant to the GSA FSS' under FAR subpart 8.4" *Id*. (citation and quotation marks omitted). Here, there is no question that the order at issue was issued against a GSA FSS. The RFQ itself, which was issued via the GSA e-Buy system, stated:

This acquisition is being conducted in accordance with [FAR] Subpart 8.4, "Federal Supply Schedules." The Government is requesting quotes from vendors that have contracts under [GSA's] Schedule 599: Travel Services Solutions.

T. 3 at 32. CSI holds a GSA Schedule 599 and submitted a fully-compliant proposal in response to the RFQ, but was not selected for award. Accordingly, CSI is an interested party with standing, and the Court is authorized to award "any relief that the court considers proper, including declaratory and injunctive relief." 28 U.S.C. § 1491(b)(1), (2).

When reviewing an agency's decision in a bid protest, the Court utilizes the standards set forth in the Administrative Procedure Act ("APA"). 28 U.S.C. § 1491(b)(4). The APA provides in relevant part that a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Thus, the Court will set aside a procurement action if: "(1) the procurement official's decision lacked a rational basis; or (2) the procurement procedure involved a violation of regulation or procedure." *Impresa Construzioni Geom. Domenico Garufi v. U.S.*, 238 F.3d 1324, 1332 (Fed. Cir. 2001).

Although the Court's review of agency action is deferential, it is also "searching and careful." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971), superseded by statute on other grounds as recognized in Califano v. Sanders, 430 U.S. 99 (1977). When

agency action is alleged to be arbitrary or capricious or an abuse of discretion, the Court will "determine whether the contracting agency provided a coherent and reasonable explanation of its exercise of discretion." *Impresa*, 238 F.3d at 1332-33. The contemporaneous evaluation record must supply the satisfactory explanation for the agency's action. "The reviewing court should not attempt itself to make up for such deficiencies," or "supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Thus, when an agency submits a justification for its action, the facts supporting this justification must be supported by the administrative record. *See Great Lakes Dredge & Dock Co. v. U.S.*, 60 Fed. Cl. 350, 358 (2004).

ARGUMENT

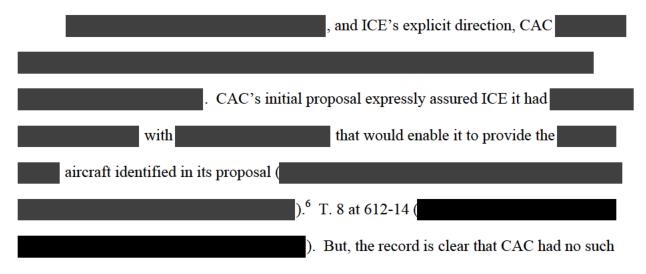
I. ICE UNREASONABLY EVALUATED CAC'S TECHNICAL APPROACH WITH RESPECT TO ITS ABILITY TO PROVIDE THE PROMISED AIRCRAFT

Under the single most significant RFQ requirement, offerors had to propose a fleet of DSLA aircraft dedicated exclusively to ICE for the contract duration. T. 6 at 334. In structuring the RFQ, ICE stressed the importance of this requirement by mandating that offerors identify:

- The <u>specific</u> air carriers it would utilize to furnish the DSLA fleet, providing ICE with FAA certifications and copies of insurance coverage for each aircraft owner/carrier (under the Technical Approach subfactor) and aviation safety records (as part of the Charter Aviation Experience subfactor). *Id.* at 361-62.
- The <u>specific DSLA</u> aircraft proposed, providing <u>definitive</u> information for <u>each</u> required aircraft: (1) FAA registration numbers; (2) the identity of the aircraft owner; (3) the total seat number and configuration; and (4) the aircraft make and model. *Id*.

Thus, the RFQ required offerors to identify each and every specific air carrier and exact aircraft to be used to perform. As an essential part of the remand, ICE sent all offerors

T. 161 at 4478 (emphasis added); *see also* T. 162 at 4480; T. 163 at 4482; T. 164 at 4484. In doing so, ICE affirmed that it was obligated to consider an offeror's demonstrated ability to supply the <u>specific proposed aircraft</u> in connection with evaluating each offeror's Technical Approach.⁵ That is, ICE unequivocally settled that an offeror's displayed ability to furnish the proposed aircraft (and the production of supporting documents) was an <u>integral</u> part of the evaluation under the most important Technical Capability subfactor.



_

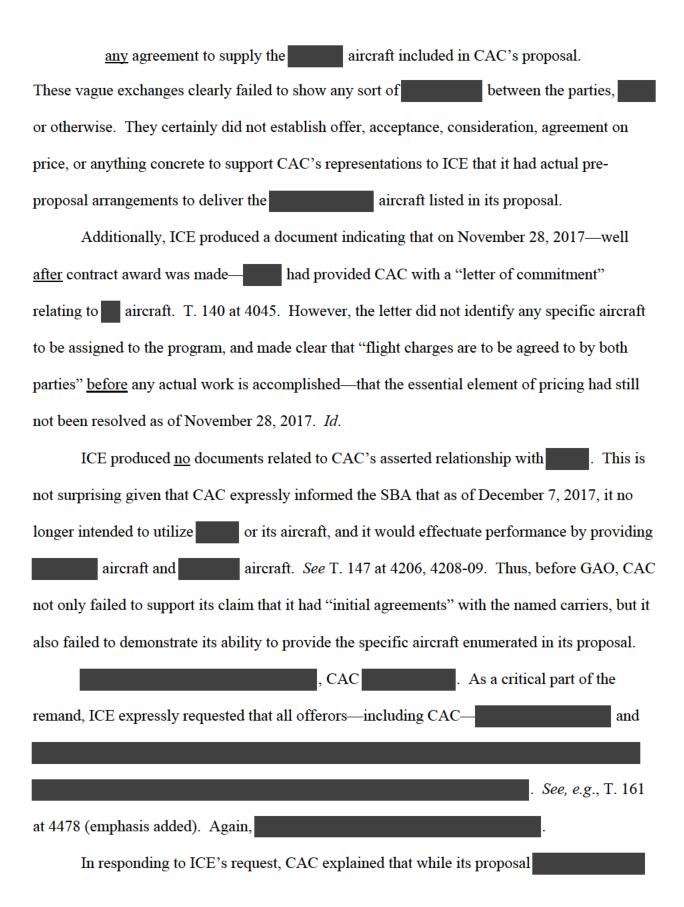
⁵ In denying CSI's protest regarding CAC's failure to demonstrate its capability to provide the proposed aircraft, GAO placed great weight on the fact that the RFQ did not require offerors to include teaming agreements with their proposals. T. 155 at 4422. GAO went astray. CSI had argued that the very structure of the RFQ inherently necessitated that (1) offerors have in place prior to proposal submission some sort of agreement with air carriers to meet requirements; and (2) ICE evaluate an offeror's demonstrated ability to supply the proposed aircraft. ICE clearly agreed when, during the remand, it demanded that each offeror agreed when the remand of the remand of the remand of the technical approach.

⁶ Notably, the PWS does not allow for the wholesale substitution of aircraft during contract performance. In fact, it addresses substitutions only once—in the context of liquidated damages—warning offerors: "Aircraft substitutions less than 24 hours prior to the scheduled departure time will <u>only be permitted to replace mechanically deficient aircraft or for other unusual circumstances</u>." T. 6 at 341 (emphasis added).

agreements for any aircraft then,

CAC's shortfall was clear from the very start when, upon being notified of the ICE award on October 20, 2017, CAC and an assortment of companies purporting to act on its behalf began concerted efforts to secure the DSLA aircraft necessary to perform. In particular, CSI was informed by team members that since the award, they have been contacted by CAC, or third parties inquiring for CAC, to request their carrier services. For example, CSI received a letter explaining that from emailed on October 24, 2017, stating, T. 59 at 1879. Additionally, CSI received a letter from stating that CAC contacted post-award to advise that *Id.* at 1884. Such last-minute scrambling would only have been necessary if CAC had All of the evidence gleaned from the GAO and SBA matters plainly underscores this fact. Throughout the GAO process, CAC failed to produce any agreements with its air carriers for the promised aircraft. Instead, with assistance from CAC and its attorneys, ICE attempted to cobble together bits of documentation to evince CAC's pre-proposal surprisingly, these efforts were a wholesale failure. The only pre-proposal documents ICE and CAC were able to produce were two CAC email exchanges with , showing:

- On June 30, 2017, provided CAC high-level price quotes for geographic locations. T. 127 at 4016-17. The exchange did not manifest any commitments, provide a period for which the quoted prices would be valid, or specify access to any aircraft, much less the aircraft included in CAC's initial proposal.
- On July 6, 2017, apparently provided CAC with registrations and airworthiness certificates for
 T. 128 at 4018-19. This exchange did not show

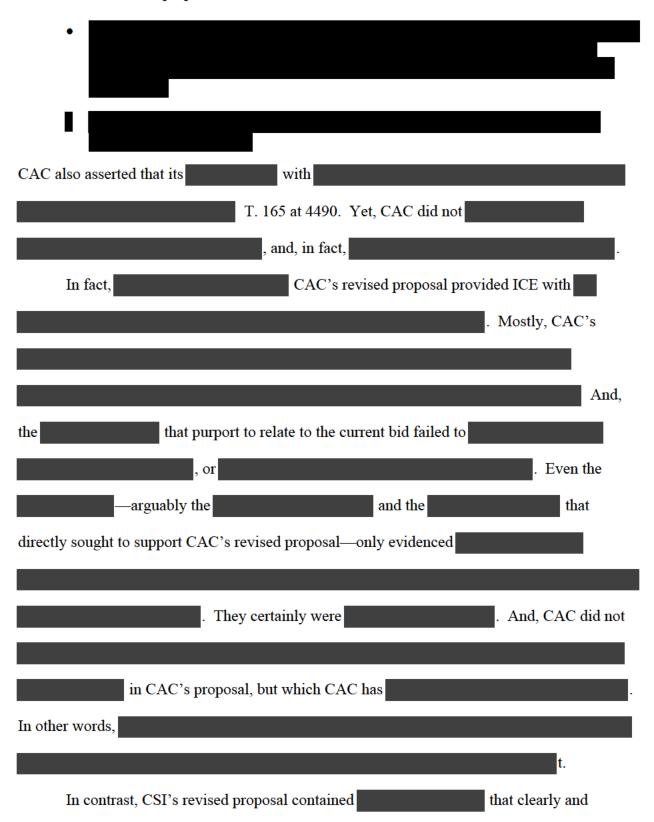


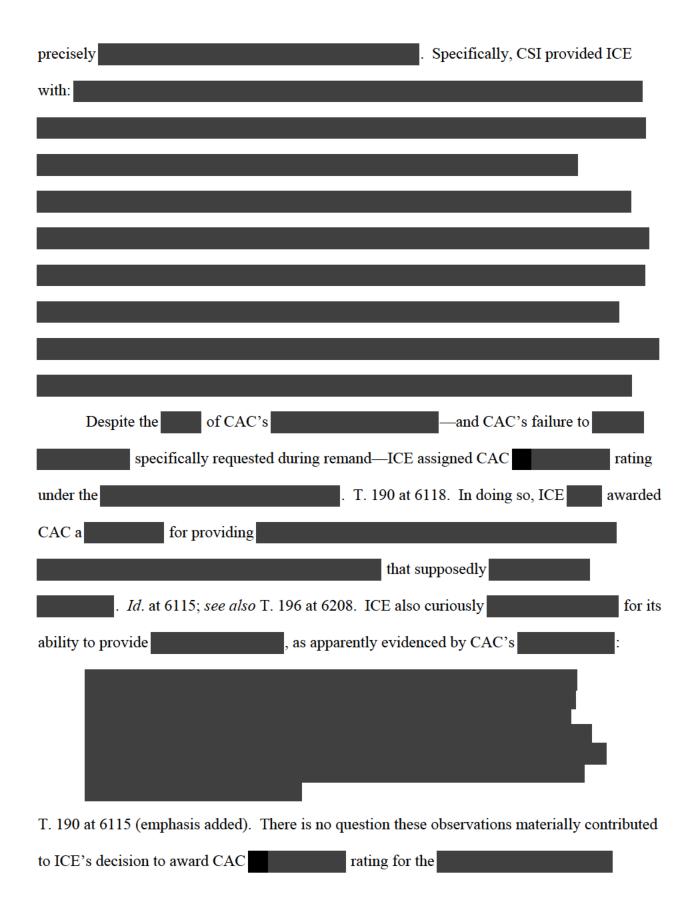
T. 165 at 4488. But, , CAC could provide In response to ICE's direction to provide such documentation, CAC produced only the following related to the listed in its revised proposal: ⁷ CAC's revised proposal contained While CAC had previously proposed to provide its revised proposal . T. 166 at 4628-30. Thus, included . See id. CAC erroneously asserts

See id.

⁹ *Id.* at 4745-46 (emphasis added). included in its revised proposal, CAC produced With respect to the only the following: CAC also asserted that T. 165 at 4489-90, but CAC provided to that effect. And finally, CAC produced only the following with respect to the ⁹ Notably, this was a provided to CAC, illustrated by the fact that both from in their revised proposals. T. included a 171 at 5115; T. 173 at 5317.

included in its revised proposal:

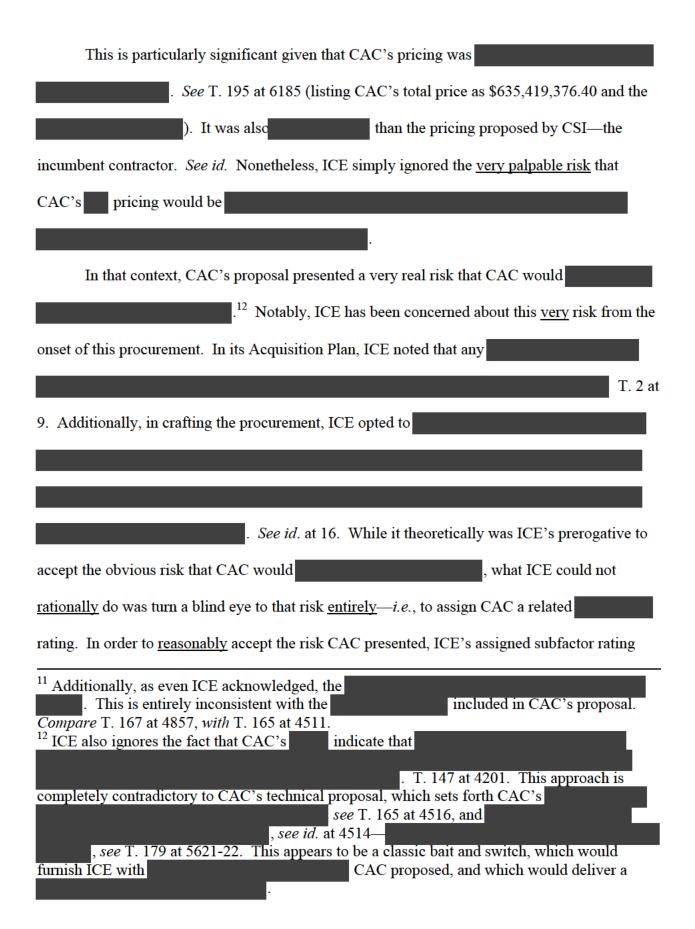




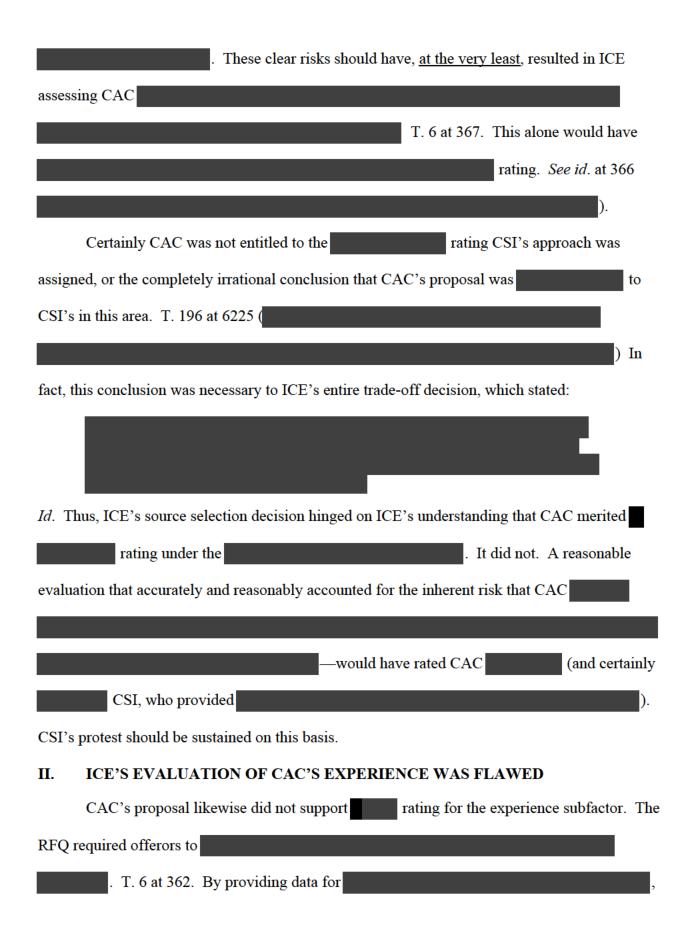
and the In turn, these ratings heavily influenced ICE's trade off analysis and award decision. But, ICE's evaluation was plainly unreasonable. While CSI recognizes the discretion afforded to agencies in evaluating proposals, such discretion is not unfettered. When an agency's evaluation conclusions are being questioned, the Court must "determine whether the . . . agency provided a coherent and reasonable explanation of its exercise of discretion." *Impresa*, 238 F.3d at 1332-33 (citations and quotations omitted); FFL Pro, LLC v. U.S., 124 Fed. Cl. 536, 555-56 (2015). In order for agency discretion to be reasonable, it must not only satisfy the APA "arbitrary and capricious standard," it must also "evinc[e] rational reasoning and consideration of relevant factors." Advanced Data Concepts, Inc. v. U.S., 216 F.3d 1054, 1058 (Fed. Cir. 2000) (emphasis added). An agency cannot rationally ignore clear risks in an offeror's proposal, or deviate from its evaluation methodology. Although ICE demanded , unequivocally making that capability part of the technical evaluation, ICE (1) arbitrarily ignored CAC's ; and (2) irrationally <u>overlooked</u> the fact that CAC's 10,11 ¹⁰ ICE irrationally failed to recognize that the proposals of suffer from the same flaw as CAC's. ICE posed the . T. 163 at 4482; T. 164 at 4484. However, the record demonstrates that neither provided ICE with than CAC did. Indeed, like CAC, the those offerors were able to provide were For example,

T. 173 at 5317.

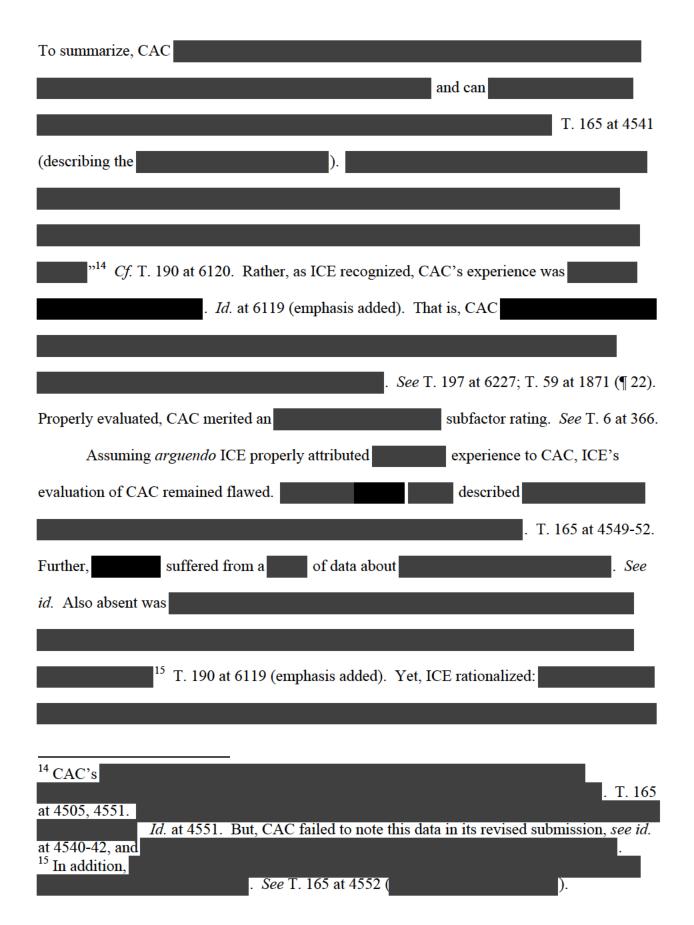
T. 171 at 5115.

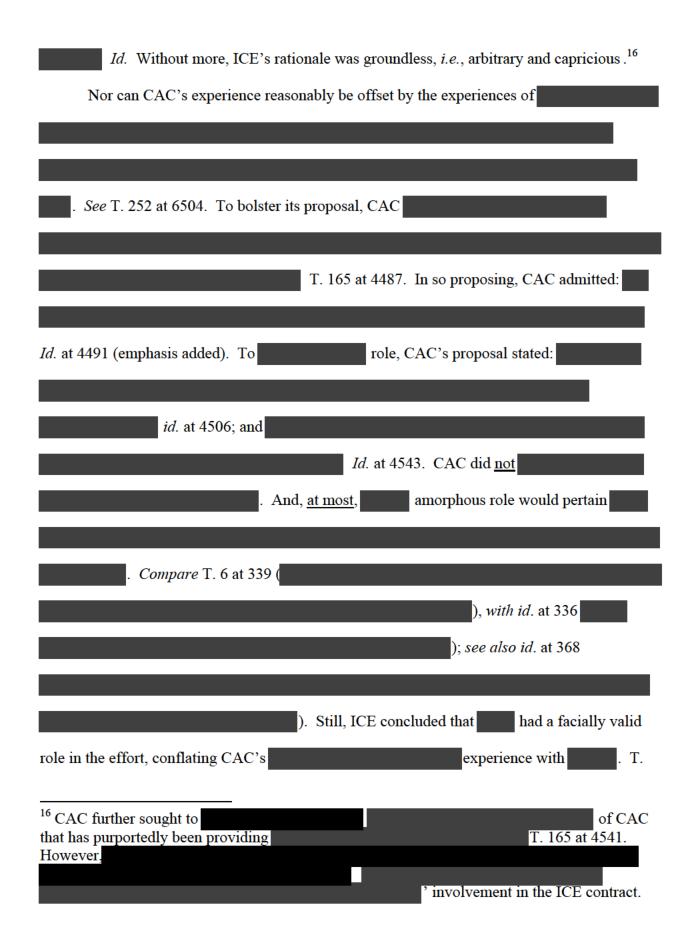


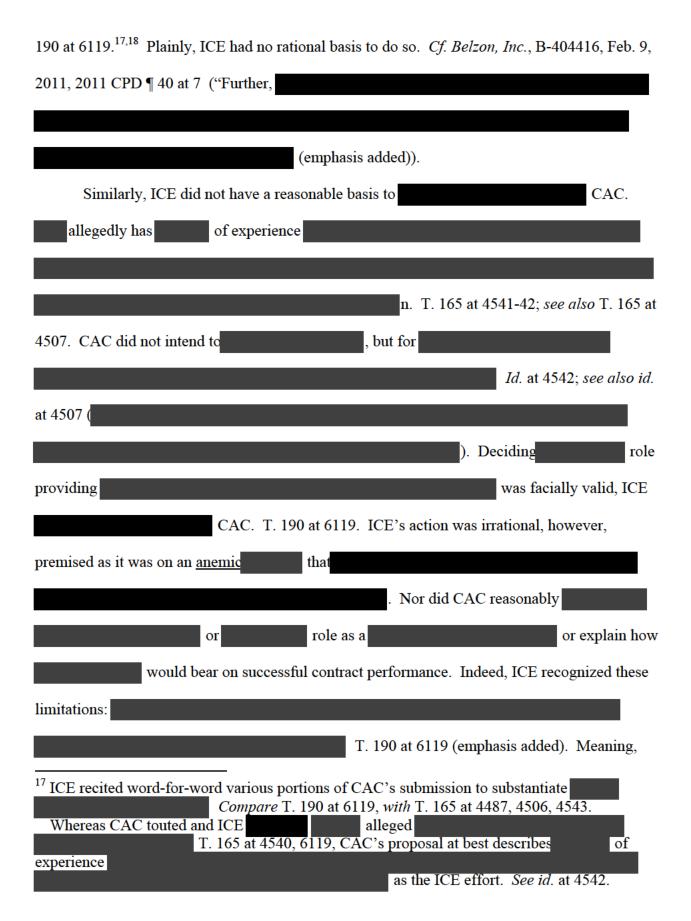
had to reflect that risk. It absolutely did not—at least not in any rational way. Oddly, the SSA introduced the concept of in the source selection decision. However, the risk analysis was done irrationally and missed the point entirely. Specifically, when discussing CAC's , the SSA called out T. 196 at 6217. But, this was not the risk CAC's proposal posed. Rather, the obvious risk in CAC's proposal was twofold. First, there was CAC's . Next, there was the realistic possibility that . If this occurred, ICE made clear that it would . It was bound to do so. Clearly, this did not occur when ICE assessed CAC a



```
and with which CAC
                                                    , CAC's proposal was as to these
requirements. This undermined ICE's evaluation of CAC.
       Still more, CAC's proposal did not evince experience that
               For instance, CAC claimed to have (1) of experience
              (2)
                                                                        and (3)
                                                          See T. 165 at 4540; see also T. 6 at
362. CAC critically attributed these
                                    T. 165 at 4540, 4541; see also T. 165 at 4549-52.
Problematically, ICE conflated
                                                 .<sup>13</sup> T. 6 at 365; T. 190 at 6118-19;
                                                  " (citation omitted) (emphasis added)). That
is, the RFQ precluded ICE from
                                                                                         Yet,
that is exactly what ICE did, improperly assessing CAC
                                                                        T. 190 at 6118-19; see
also T. 190 at 6119 (evaluating
                                                                    (emphasis added)).
       On its own, CAC's experience was
                                                           in meeting the RFQ's requirements.
<sup>13</sup> Founded in 2012, CAC was not a
                                T. 165 at 4505; cf. Tech. Res., Inc., B-253506, Sept. 16, 1993,
93-2 CPD ¶ 176 at 3 ("an agency[] may
                                                    (citations omitted)); Mesa, Inc., B-254730,
Jan. 10, 1994, 94-1 CPD ¶ 62 at 7 ("An agency may
                                                                        ." (citations omitted)).
```







there was no rational justification for ICE's reliance on to elevate CAC's experience.

improperly deemed all of CAC's as facially valid. *Cf. Lab. Corp. of Am. Holdings v. U.S.*, 116 Fed. Cl. 643, 652 (2014) ("[T]he agency must articulate the reasons for its procurement decision including a rational connection between the facts found and the choice made." (citation omitted)). In turn, ICE improperly CAC's experience rating from at 6120. Against this backdrop, ICE's evaluation had no rational basis and was flawed, *i.e.*, was arbitrary and capricious. *See CMI Mgmt., Inc. v. U.S.*, 115 Fed. Cl. 276, 288 (2014) (the Court will set aside an agency's decision as arbitrary and capricious if the agency entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before it (citations and quotation marks omitted)).

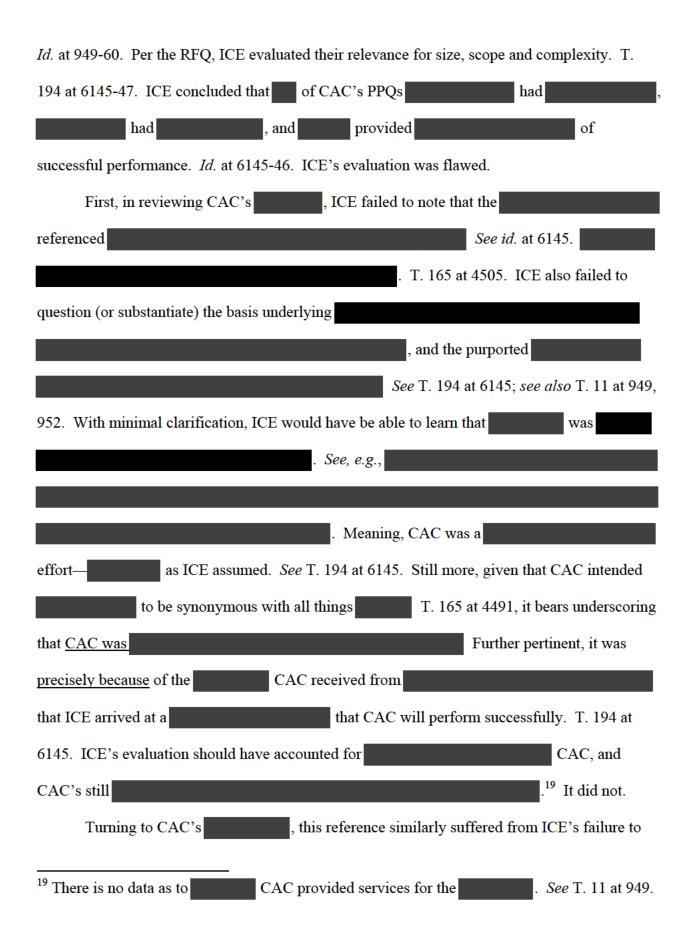
III. ICE'S EVALUATION OF CAC'S PAST PERFORMANCE WAS FLAWED

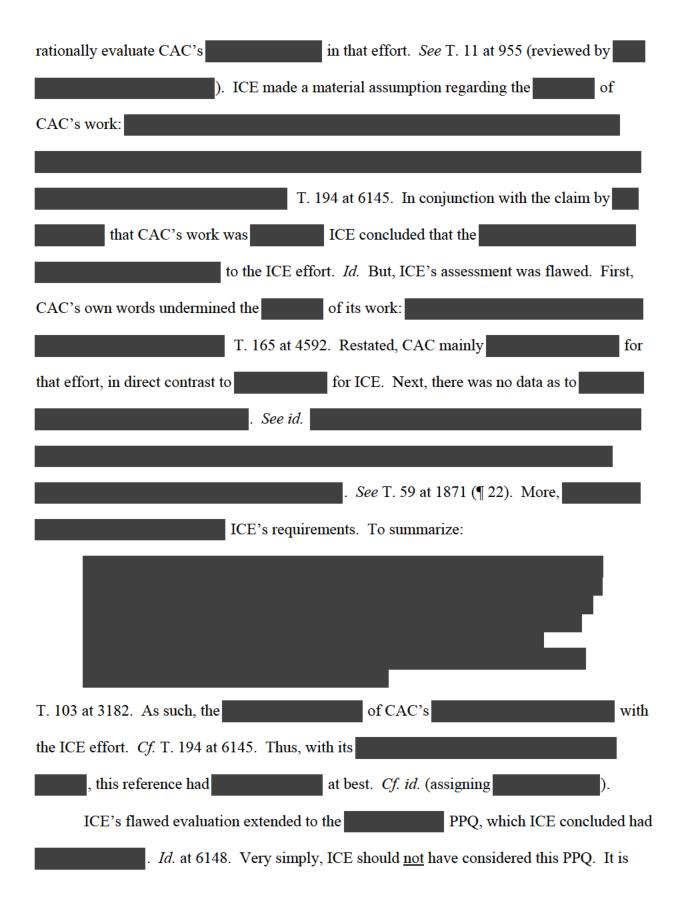
CAC's past performance did not merit a rating. ICE evaluated related Past Performance Questionnaires ("PPQ").

Contract | Davied of | Contract Identification

T. 11 at 949-76. CAC's PPQs reflected:

Agency Name	Contract Value	Period of Performance	(Description of Services)
			(2 3331 p 1332 01 304 (1003)



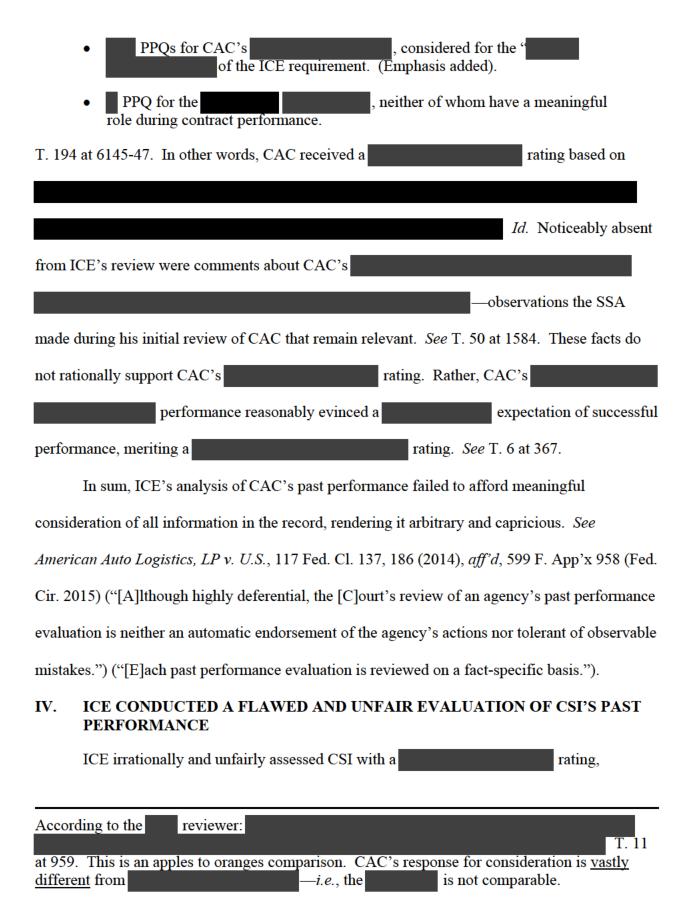


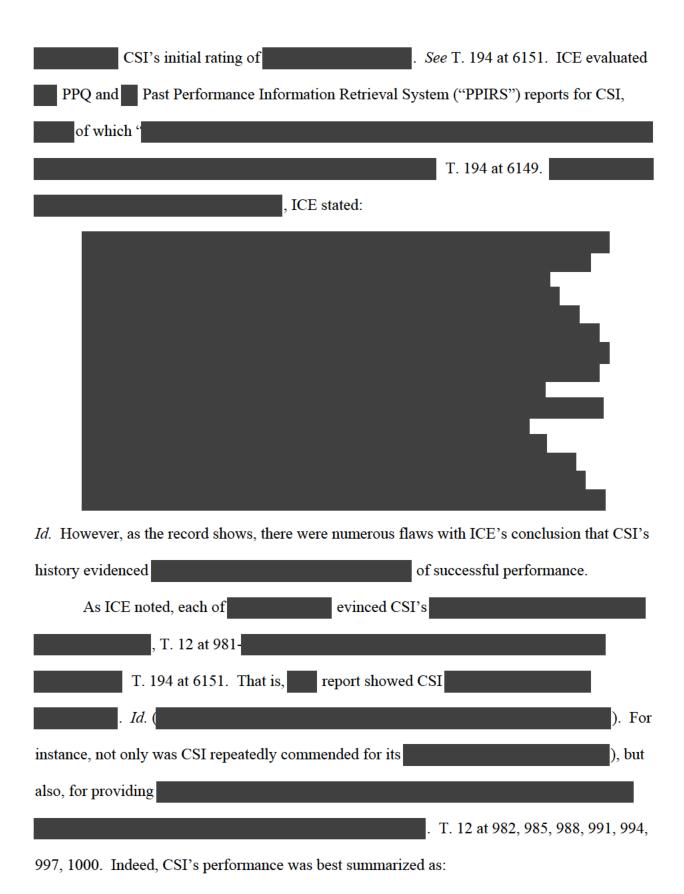
inappropriate to consider a company's record where it will not bear on the likelihood of successful performance by the prime, i.e., where it will not make meaningful contribution during the contract. NAHB Research Ctr., Inc., B-278876, May 4, 1998, 98-1 CPD ¶ 150 at 3 (citations omitted). Likewise, when considering the performance of a subcontractor's affiliate, attention must be given as to whether the resources of the affiliate will affect the performance of the subcontractor—whether the affiliate will have meaningful involvement during performance. See Precision Asset Mgmt. Corp. v. U.S., 135 Fed. Cl. 342, 357 (2017) (citations omitted). As noted during contract performance.²⁰ in Section II, CAC Similarly, CAC made T. 165 at its 4491—but gave no explanation as to what the ICE effort. See generally id. Without more, it was unreasonable ' reference, and to attribute it to CAC's performance rating. for ICE to consider In the final analysis, the records shows that ICE relied on the following to assign CAC a past performance rating: A PPQ prepared by CAC's , regarding CAC's Another PPQ regarding CAC's , during which CAC

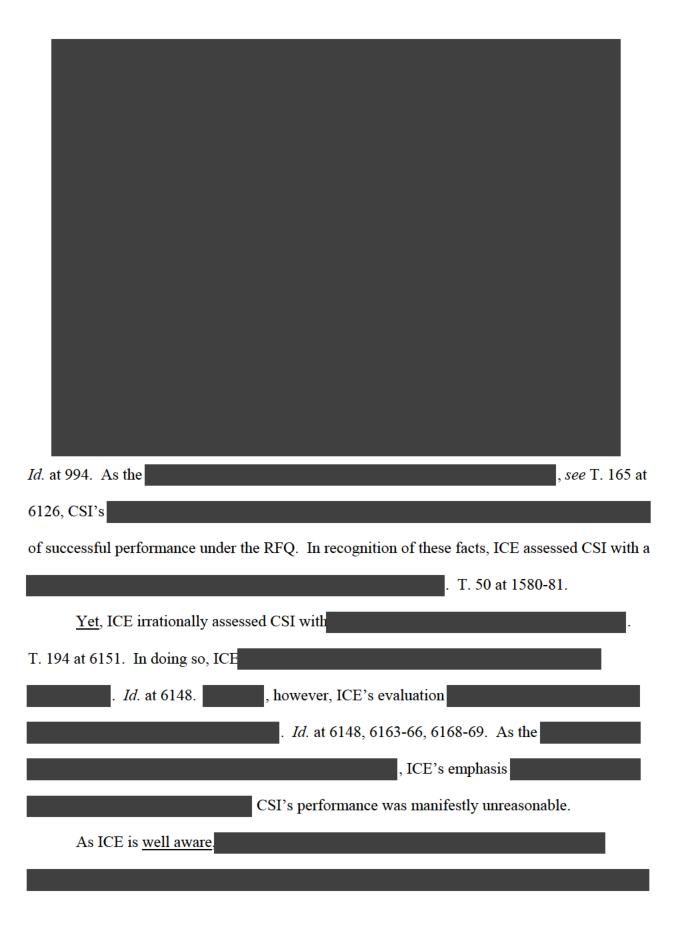
CAC's

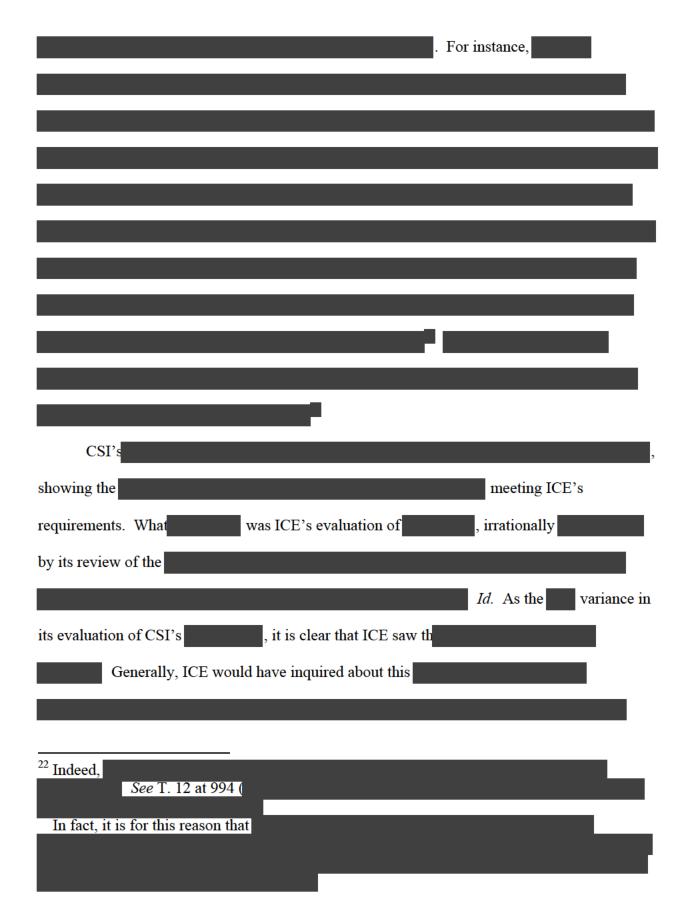
²⁰ In addition, CAC did not submit

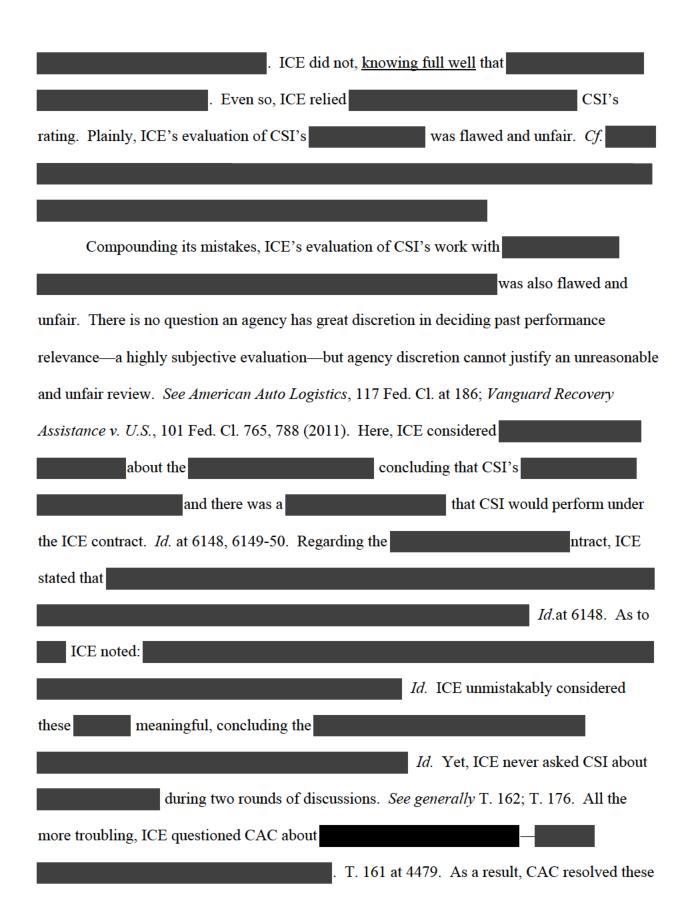
According to ICE, the
T. 194 at 6146.

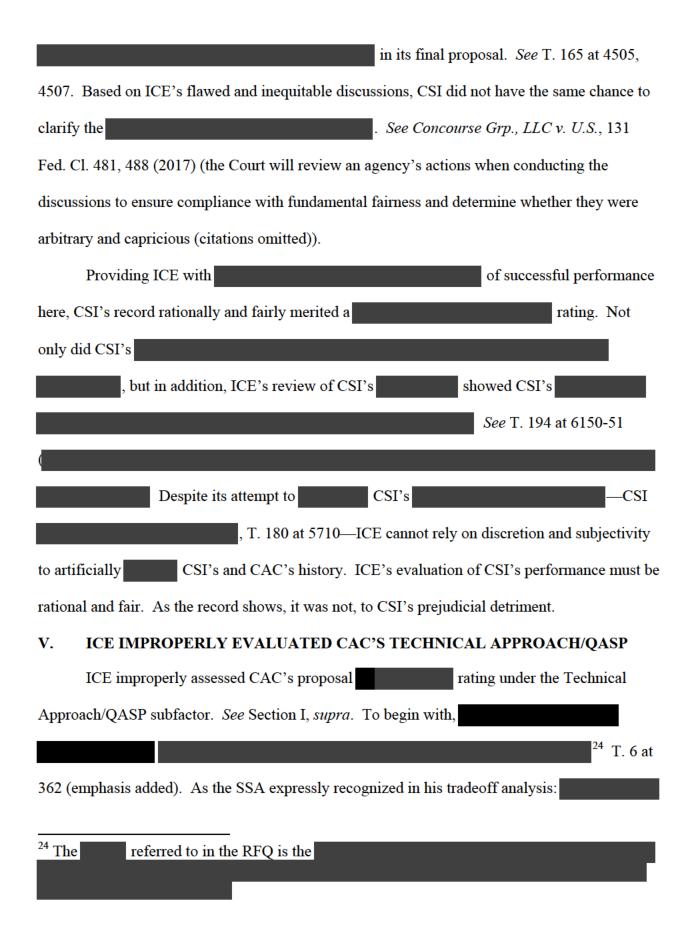


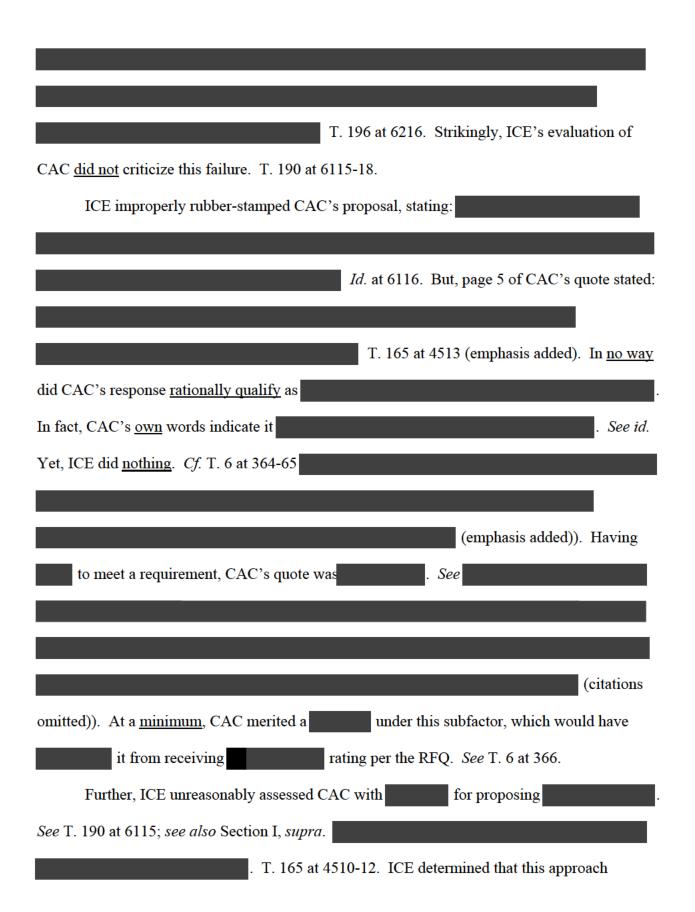


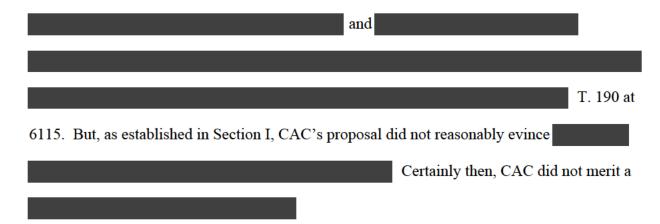






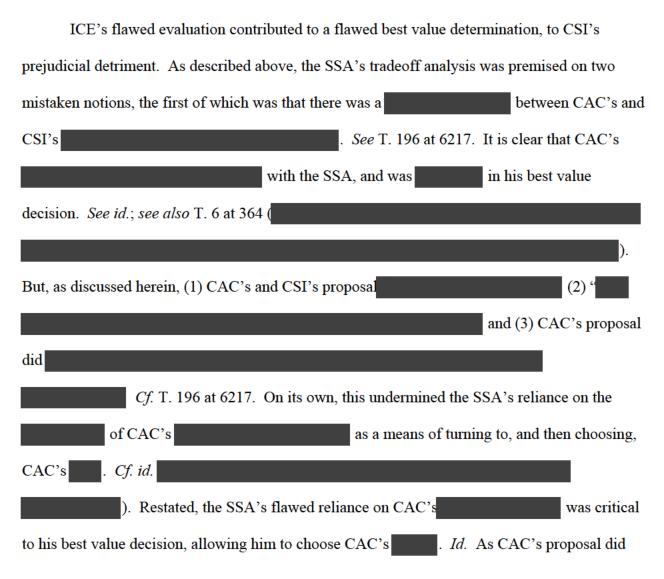






Against this backdrop, ICE's failure to reasonably evaluate CAC's proposal cannot stand.

VI. ICE'S ERRORS INVALIDATED ITS BEST VALUE DECISION AND PREJUDICED CSI

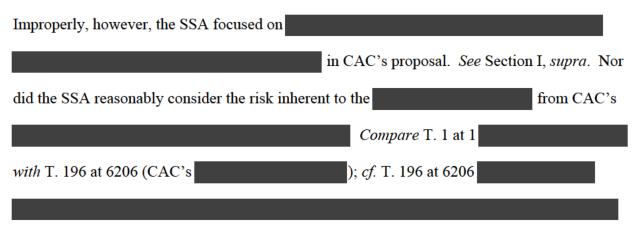


not merit the value the SSA attributed to it, ICE's flawed best value decision must be set aside.

Adding to the SSA's flawed tradeoff analysis was his flawed performance risk analysis:



Id. The SSA's consideration of risk was especially necessary under the DSLA thrust of the RFQ.



). In the face of these

weighty mistakes, the SSA's decision to award to CAC was flawed and cannot stand.

ICE's decision to award to CAC instead prejudiced CSI. To establish prejudice, a protester need not show that but for the agency's errors, it would have received the award. *See Bannum, Inc. v. U.S.*, 404 F.3d 1346, 1358 (Fed. Cir. 2005). Rather, it need only show that there was a substantial chance it would have received award had the agency not made the errors, *id.*, as CSI has shown here. ICE's award decision was premised on numerous flaws in the evaluation process and is invalid. These errors, taken together or separately, fatally infected ICE's best value determination, rendering the award to CAC irrational and unlawful. If not for these errors, ICE would have awarded the task order to CSI.

VII. CSI IS ENTITLED TO PERMANENT INJUNCTIVE RELIEF

Based on the foregoing, this Court should permanently enjoin ICE from proceeding with the task order awarded to CAC. CSI has demonstrated that ICE's award decision was infected by multiple, prejudicial evaluation errors. CSI is entitled to injunctive relief to remedy these errors because: (1) it will suffer irreparable harm if injunctive relief is not granted; (2) the balance of hardships favors granting injunctive relief; and (3) granting injunctive relief is in the public interest. *See PGBA, LLC v. U.S.*, 389 F.3d 1219, 1228-29 (Fed. Cir. 2004).

The irreparable harm to CSI in the absence of an injunction is clear: CSI will have been deprived the opportunity to compete fairly for an award that it had a substantial chance of winning but for ICE's improper evaluation and award decision. This is precisely the type of irreparable harm that this Court has found warrants entry of permanent injunctive relief. *See, e.g., NetStar-1 Gov't Consulting, Inc. v. U.S.*, 101 Fed. Cl. 511, 530 (2011), *aff'd*, 473 Fed. Appx. 902 (Fed. Cir. 2012); *MORI Assocs., Inc. v. U.S.*, 102 Fed. Cl. 503 (2011).

The balance of harms also weighs in favor of an injunction. ICE will suffer no harm if performance of this illegally awarded task order is permanently enjoined, and ICE is required to fix its mistakes. In fact, because CAC's ability to actually perform has been called into question, ICE will likely benefit from an injunction.

Moreover, the issuance of an injunction here is in the public interest. ICE has violated procurement laws and regulations in its conduct of the procurement and, thus, it is necessary to award injunctive relief to correct its errors and restore integrity to the procurement process. *See Wetsel-Oviatt Lumber Co. v. U.S.*, 43 Fed. Cl. 748, 753 (1999) ("[W]here the federal procurement process is tainted by arbitrary and capricious government action, the public interest is served by restoring integrity to the procurement process.") (citing *Parcel 49C, Ltd. P'ship v.*

U.S., 31 F.3d 1147, 1154 (Fed. Cir. 1994)) (other citations omitted). This is especially true given

that this is a procurement for vitally important services that will have a profound impact on

immigration enforcement for years to come. It is imperative, therefore, that ICE get this right.

Accordingly, the public interest weighs in favor of an injunction.

CONCLUSION

For the foregoing reasons, CSI respectfully requests that this Court grant it judgment

upon the administrative record. CSI respectfully requests that the Court grant the requested

declaratory and injunctive relief, requiring ICE to terminate CAC's award and re-procure the

services in the subject procurement in accordance with the statutes, regulations, and a reasonable

exercise of discretion.

Respectfully submitted,

Vedder Price, P.C.

s/ Eric J. Marcotte

Eric J. Marcotte

David M. Hernandez

Kelly E. Buroker

Tamara Droubi

Counsel for CSI Aviation, Inc.

DATED: May 15, 2018

40

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed, via the Electronic Case File ("ECF") System of the United States Court of Federal Claims, on May 15, 2018. I understand that this document will be sent to all parties via the Court's ECF System. In accordance with the Rules of the Court of Federal Claims ("RCFC"), Appendix E, Rule 12(c), CSI has, therefore, served notice on counsel of record.

Dated: May 15, 2018 s/ Eric J. Marcotte

Eric J. Marcotte, Attorney of Record Vedder Price P.C. 1401 I Street, NW, Suite 1100 Washington, DC 20005 (202) 312-3336 (phone) (202) 312-3322 (fax) emarcotte@vedderprice.com

Counsel for Plaintiff CSI Aviation, Inc.